Minister for Immigration & Multicultural & Indigenous Affairs v Kord

[2002] FCAFC 77

Minister for Immigration & Multicultural & Indigenous Affairs v Kord

[2002] FCA 334

The Federal Court adopted a new medium neutral citation (FCAFC) for Full Court judgments effective from 1 January 2002. Single Judge judgments will not be affected and will retain the FCA medium neutral citation.

The transitional arrangements are as follows:

- All Full Court judgments delivered *prior* to 1 January 2002 will retain the FCA medium neutral citation.
- All Full Court judgments delivered *between* 1 January 2002 to 30 April 2002 have been assigned **parallel** medium neutral citations in both the FCA and FCAFC series.
- All Full Court judgments delivered *from* 1 May 2002 will contain the FCAFC medium neutral citation only.

FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural & Indigenous Affairs v Kord [2002] FCA 334

MIGRATION – Determination of refugee status – review of decision of Refugee Review Tribunal – meaning of "persecution" – whether discrimination constitutes persecution for a Convention reason – whether Refugee Review Tribunal committed an error of law

WORDS & PHRASES – *"persecution"*

Migration Act 1958 (Cth)

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989-1990) 169 CLR 379, considered

Applicant A v Minister for Immigration and Ethnic Affairs (1996-97) 190 CLR 225, considered

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559, considered

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293, considered

Minister for Immigration and Multicultural Affairs v Ibrahim (2000) 204 CLR 1, applied

Gersten v Minister for Immigration and Multicultural Affairs [2000] FCA 855, distinguished

Kanagasabai v Minister for Immigration and Multicultural Affairs [1999] FCA 205, distinguished

Convention relating to the Status of Refugees (1951)

Protocol relating to the Status of Refugees (1967)

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v GHOLAM REZA FILINEJAD KORD

W 443 of 2001

HEEREY, MARSHALL & DOWSETT JJ

28 MARCH 2002

BRISBANE (VIA VIDEO LINK, HEARD IN PERTH)

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 443 OF 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS APPELLANT
AND:	GHOLAM REZA FILINEJAD KORD RESPONDENT
JUDGES:	HEEREY, MARSHALL & DOWSETT JJ
DATE OF ORDER:	28 MARCH 2002
WHERE MADE:	BRISBANE (VIA VIDEO LINK, HEARD IN PERTH)

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders below be set aside.

3. The application for review of the Tribunal's decision be dismissed.

4. The respondent to the appeal pay the appellant's costs of the appeal and of the proceedings before Hely J.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA	
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ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS APPELLANT
AND:	GHOLAM REZA FILINEJAD KORD RESPONDENT

JUDGES:	HEEREY, MARSHALL & DOWSETT JJ
DATE:	28 MARCH 2002
PLACE:	BRISBANE (VIA VIDEO LINK, HEARD IN PERTH)

REASONS FOR JUDGMENT

HEEREY J:

1 I agree generally with the reasons for judgment of Marshall and Dowsett JJ. I would, however, add some observations.

2 The Refugees Convention's definition of "refugee" speaks of a person's "fear of being persecuted". The use of the passive voice conveys a compound notion, concerned both with the conduct of the persecutor and the effect that conduct has on the person being persecuted. In the many authorities cited by their Honours "persecution" and the associated word "harm" are used, sometimes in the same paragraph, both in the verb/action sense of conduct inflicting harm and in the noun/effect sense of the harm inflicted. This is not surprising, since, depending on the circumstances of a particular case, attention may be focussed on one aspect rather than another. In the case discussed by their Honours, *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 855, it seems the Court was concerned with the noun/effect sense. The Full Court spoke (at [43]) of the appellant's claim

"…that as well as imprisonment the persecution he feared included, by way of example, the cost and inconvenience of defending a perjury charge, suffering political embarrassment, interference with his business relationships and disbarment. It is submitted that, in holding that these matters were not persecution but rather harm which fell short of persecution, the Tribunal erred in its interpretation and application of the word 'persecution', a word which it is submitted was not to be confined, as the Tribunal did, to 'serious harm'."

3 The Full Court held (at [48]) that the Tribunal "did no more than reiterate … the proposition that persecution involves harm that is more than trivial or insignificant". For the reasons given by Marshall and Dowsett JJ, the same can be said of the Tribunal's reasoning in the present case. The Tribunal, citing and applying the relevant authorities, engaged in a qualitative assessment of the harm it accepted the respondent had suffered, on the implicit assumption that there was no objectively well founded fear that he would suffer harm of greater magnitude were he to be returned to Iran. That qualitative assessment was a question of fact. No legal error is disclosed. I do not think it useful to be drawn into a semantic debate as to whether harm may be sufficient for the purposes of the Convention definition if it is characterised as more than "trivial or insignificant" even though less than "serious or significant".

4 I agree with the orders proposed by Marshall and Dowsett JJ.

I certify that the preceding four (4) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey.

Associate:

Dated: 28 March 2002

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W443 OF 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS APPELLANT
AND:	GHOLAM REZA FILINEJAD KORD RESPONDENT

JUDGES:	HEEREY, MARSHALL & DOWSETT JJ
DATE:	28 MARCH 2002
PLACE:	BRISBANE (VIA VIDEO LINK, HEARD IN PERTH)

REASONS FOR JUDGMENT

MARSHALL & DOWSETT JJ:

Background

5 The respondent was born in Iran on 25 August 1962, is a citizen of that country and arrived in Australia on 3 November 2000. On 24 November

2000 he lodged an application for a protection visa. On 22 December 2000 a delegate of the Minister, the present appellant, refused the application. The Refugee Review Tribunal (the "Tribunal") affirmed that decision. Hely J subsequently upheld an application to this Court for review of the Tribunal's decision. His Honour remitted the matter to the Tribunal for reconsideration and ordered that the appellant pay the respondent's costs of the application. This is an appeal from that decision.

The respondent's claimS

6 The respondent claims to be a refugee pursuant to the Convention relating to the Status of Refugees (1951) and the Protocol relating to the Status of Refugees (1967) in that he:

"… owing to well founded fear of being persecuted for reasons of race … is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country … ."

7 He is of Algerian descent and claims that his dark skin has led to his being discriminated against throughout his life. He was ridiculed at school, mainly by other students and has experienced difficulty in obtaining employment other than in labouring jobs. He said that his father had experienced similar difficulties. He claimed that after his military service, he enrolled with the government employment service and has been on their books for fourteen years. During such period he has not once received a referral to a potential employer. He claims to be entitled to employment with the government because of his war service and that he has been denied that right because of his skin colour. He has also been denied employment as a bus driver. In particular, he was excluded from employment as a school bus driver because it was said that his skin colour would frighten the children. He was a national wrestling champion in 1978 and 1979. In 1983 he came second. Nonetheless, he claims that he experienced difficulty in gaining entry to national competitions. He asserts that, "If they had to choose between me and a white wrestler to enter a competition they would choose the white man over me." He wanted to compete internationally but was never given the opportunity. He left Iran because of poverty and other problems in society.

8 The respondent described two particular examples of harassment. The first incident occurred in 1998 or 1999. One of his friends had established a sports club in Ahwaz which was patronized by black people. Government officials came to the club and said that they should allocate a time and place for prayer. This was not required of other clubs frequented by non-coloured people. The respondent told the officials that the facility was a club and not a mosque, which statement apparently provoked laughter from those nearby. The government officials became angry, and one of them punched him, breaking his nose. He claims to have lost his sense of smell. The second incident occurred about six months prior to his coming to Australia. He said that whilst he was travelling on a bus in Ahwaz, police told him to alight. They then searched him. When he asked why they were

searching him, they told him to shut up and insulted him in front of thirty or forty people. He was compelled to undress partially in front of these people. He found this humiliating. He was the only coloured person on the bus.

9 The Tribunal summarised the respondent's other complaints as follows (at AB 84):

"The (respondent) claims that his life would be a gradual death because of the discrimination that he would experience as a black person if he returned to Iran. The laws of the government of Iran are racist and are biased against black people. Black people do not have the same rights and privileges as white people. The (respondent) claims that he was too frightened to get married because his children would have the same problems. Therefore the persecution he would suffer because of his skin colour would come from both government and private individuals. The (respondent) claims that because the government tolerates this situation in Iran there is no place a black citizen can get assistance."

The Tribunal's decision

10 The Tribunal accepted that the respondent's father's family had come from Algeria and that he had encountered some difficulties at school because of his colour. He attended to senior high school level but did not complete his course. He has obtained labouring jobs but has not obtained government employment. He worked as a driver and later as a wrestling instructor. The Tribunal appears to have accepted the respondent's accounts of the search on the bus and the incident at the sporting club. It seems also to have accepted that both incidents, at least to some extent, involved elements of racism, although it seems not to have accepted that racism was the only cause of the incident at the sporting club. In general, the Tribunal accepted that the respondent had "faced some discrimination in Iran because of his colour." It noted that the available country information did not indicate that racial discrimination on grounds of colour was a major problem in Iran.

11 The Tribunal concluded that although the respondent had encountered some difficulty, it did not amount to persecution. The Tribunal also did not accept that he would encounter difficulty amounting to persecution should he return to Iran. In making these findings, the Tribunal took into account the fact that the respondent had become national wrestling champion, that he had been educated to a relatively high level, had completed his national service and had generally been able to find work. It identified the "central issue in the (respondent's) case" as whether the discrimination he faced amounted to persecution "in the sense of the Convention". His claim was that he would "suffer day to day from serious discriminatory acts should he return to Iran". The Tribunal noted that discrimination is not *per se* enough to establish refugee status and that a distinction must be drawn between a breach of human rights and persecution. We will set out the Tribunal's reasons in more detail at a later stage.

The application for review

12 The respondent's application for review raised two grounds, namely that:

"(a) There was no evidence or other material to justify the making of the decision that the (respondent) did not have a well-founded fear of persecution by reason of his political opinion, real or imputed if he returned to Iran within the reasonably foreseeable future; and

(b) The decision involved an error of law, being an error of law involving the incorrect interpretation. The applicable law of an incorrect application of the law to the facts as found by the Tribunal or both (sic)."

13 Ground (a) was not pursued. Ground (b) was said to invoke the ground of "error of law" established by par 476(1)(e) of the *Migration Act 1958* (Cth) (the "Act") in the form in which it stood prior to the amendments in late 2001. The respondent's submission was that the Tribunal had misunderstood the relevant law or had incorrectly applied it to the facts. In particular, it was alleged that the Tribunal had:

"… overstated the severity or the gravity of the conduct necessary to give rise to a well-founded fear of persecution, particularly as it wrongly adopted the test for 'persecution' as being a 'standard of a sustained or systemic denial of core human rights' when single or sporadic episodes of harassment or threats on Convention reasons are sufficient to constitute persecution."

14 It was also submitted that the Tribunal had erroneously proceeded upon the basis that before there could be a finding of persecution, it was necessary that there be consequences "of a substantially prejudicial nature … ."

The law

15 We commence with the decision of the High Court in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989-1990) 169 CLR 379. A particular passage in the judgment of Mason CJ is of considerable importance for reasons which will emerge at a later stage. The passage (at 388) is as follows:

"The Convention and the Protocol do not define the words 'being persecuted' … . The delegate was no doubt right in thinking that some forms of selective or discriminatory treatment by a State of its citizens do not amount to persecution. When the Convention makes provision for the recognition of the refugee status of a person who is, owing to a well-founded fear of being persecuted for a Convention reason, unwilling to return to the country of his nationality, the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or

disadvantage if he returns. Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm, although I would not wish to express an opinion on the question whether any deprivation of a freedom traditionally guaranteed in a democratic society would constitute persecution if undertaken for a Convention reason."

16 Dawson J (at 396-7) said:

"The phrase 'well-founded fear of being persecuted' has occasioned some difference of opinion in the interpretation of the relevant Article of the Convention. Upon any view, the phrase contains both a subjective and an objective requirement. There must be a state of mind – fear of being persecuted – and a basis – well-founded – for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear. The differences which have arisen have largely stemmed from a desire to place a greater emphasis upon either the subjective or the objective element of the phrase."

17 At 399-400, his Honour continued:

" 'Persecution' is not defined in the Convention, although Arts 31 and 33 refer to those whose life or freedom may be threatened. Indeed, there is general acceptance that a threat to life or freedom for a Convention reason amounts to persecution. … Some would confine persecution to a threat to life or freedom, whereas others would extend it to other measures in disregard of human dignity … . It is unnecessary for present purposes to enter the controversy whether any and, if so, what actions other than a threat to life or freedom would amount to persecution."

18 McHugh J said at 429-431:

"The term 'persecuted' is not defined by the Convention or the Protocol. But not every threat of harm to a person or interference with his or her rights for reasons of race, religion, nationality, membership of a particular social group or political opinion constitutes 'being persecuted'. The notion of persecution involves selective harassment. It is not necessary, however, that the conduct complained of should be directed against a person as an individual. He or she may be 'persecuted' because he or she is a member of a group which is the subject of systematic harassment: … . Nor is it a necessary element of 'persecution' that the individual should be the victim of a series of acts. A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is 'being persecuted' for the purposes of the Convention. The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution: … . Moreover, to constitute 'persecution' the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute 'persecution' for the purposes of the

Convention and Protocol. Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution: … . The Federal Court of Appeal of Canada rejected the proposition that persecution required deprivation of liberty. It was correct in doing so, for persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason: … ."

19 In *Applicant A v Minister for Immigration and Ethnic Affairs* (1996-97) 190 CLR 225 at 232, Brennan CJ observed that:

"When a person has a well-founded fear of persecution, the enjoyment by that person of his or her fundamental rights and freedoms is denied."

20 At 233 his Honour observed that the feared persecution must be a persecution "that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality" and that it must be discriminatory. McHugh J said at 258-9:

"Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however, the applicant may be the only person who is subjected to discriminatory conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee.

Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution. Nor is the enforcement of laws designed to protect the general welfare of the State ordinarily persecutory even though the laws may place additional burdens on the members of the a particular race, religion or nationality or social group. Thus a law providing for the detention of the members of a particular race engaged in a civil war may not amount to persecution even though that law affects only members of that race.

However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. In cases coming within the categories of race, religion and nationality, decision-makers should

ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality would be an appropriate means for achieving a legitimate government object and not amount to persecution.

21 Gummow J said at 284:

"In ordinary usage, the primary meaning of 'persecution' is:

> 'The action of persecuting or pursuing with enmity and malignity; the infliction of death, torture or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it; the fact of being persecuted; an instance of this.'

Accordingly, I agree with the following formulation by Burchett J …:

> 'Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution.' "

22 One other aspect of this case is of some importance. At 242, Dawson J said, concerning a submission that the common fear of persecution might identify the particular group for the purposes of the Convention definition:

"That approach would ignore what Burchett J in Ram v Minister for Immigration called the 'common thread' which links the expressions 'persecuted', 'for reasons of', and 'membership of a particular social group', namely:

> 'a motivation which is implicit in the very idea of persecution, is expressed in the phrase 'for reasons of', and fastens upon the victim's membership of a particular social group. He is persecuted because he belongs to that group.' "

23 Similarly, McHugh J observed (at 256-7):

"For the purpose of this appeal, the definitional phrase that the Court is required to construe is neither 'membership of a particular social group' nor the more limited phrase 'particular social group'. The real question, dictated by s 4(1) of the Act, is to ascertain whether the Tribunal erred in law in finding that the appellants are persons:

> 'who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [are] outside the country of [their] nationality and [are]

> unable or, owing to such fear, [are] unwilling to avail [themselves] of the protection of that country.'
>
> … The phrase 'a well-founded fear of being persecuted for reasons of … membership of a particular social group' is a compound conception. It is therefore a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of failure to construe the definition as a whole.
>
> Where the claim is one of a 'well-founded fear of being persecuted for reasons of … membership of a particular social group', the interaction between the concepts of 'persecuted', 'for reasons of' and 'membership of a particular social group' is particularly important. Defining the group widely increases the difficulty of proving that a particular act is persecution 'for reasons of … membership' of that group."

24 In *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570, the majority (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ) said:

"In Chan, Mason CJ referred to persecution as requiring 'some serious punishment or penalty or some significant detriment or disadvantage'. One other statement of his Honour in that case is also relevant to this appeal. His Honour said:

> 'Discrimination which involves interrogation, detention or exile to a place remote from one's place of residence under penalty of imprisonment for escape or for return to one's place of residence amounts prima facie to persecution unless the actions are so explained that they bear another character.'

In the same case, Dawson J said that:

> 'there is general acceptance that a threat to life or freedom for a Convention reason amounts to persecution … . Some would confine persecution to a threat to life or freedom, whereas others would extend it to other measures in disregard of human dignity.'

In Chan, McHugh J said that persecution was selective harassment and that in appropriate cases it could include single acts of oppression and measures 'in disregard' of human dignity."

25 Although the High Court did not comment directly upon any of these passages, we assume that they were quoted with intended approval.

26 In *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at [12] and [24], the majority (Gleeson CJ, Gaudron, Gummow and Hayne JJ) approved the observations by Dawson and McHugh

JJ in *Applicant A* concerning the inter-relationship of the various aspects of the definition of the term "refugee" for the purposes of the Convention. At [24] – [29], their Honours observed:

"[24] As already indicated, there is a common thread linking the expressions 'persecuted', 'for reasons of' and 'membership of a particular social group' in the Convention definition of 'refugee'. In a sense, that is to over simplify the position. The thread links 'persecuted', 'for reasons of' and the several grounds specified in the definition, namely, 'race, religion, nationality, membership of a particular social group or particular opinion'.

[25] As was pointed out in Applicant A, not every form of discriminatory or persecutory behaviour is covered by the Convention definition of 'refugee'. It covers only conduct undertaken for reasons specified in the Convention and the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution. Moreover, the question whether particular discriminatory conduct is or is not persecution for one or other of the Convention reasons may necessitate different analysis depending on the particular reason assigned for that conduct.

[26] The need for different analysis depending on the reasons assigned for the discriminatory conduct in question may be illustrated, in the first instance by reference to race, religion and nationality. If persons of a particular race, religion or nationality are treated differently from other members of society, that, of itself, may justify the conclusion that they are treated differently by reason of their race, religion or nationality. That is because, ordinarily, race, religion and nationality do not provide a reason for treating people differently.

[27] The position is somewhat more complex when persecution is said to be for reasons of membership of a particular social group or political opinion. There may be groups – for example, terrorists groups – which warrant different treatment to protect society. So, too, it may be necessary for the protection of society to treat persons who hold certain political views – for example, those who advocate violence or terrorism – differently from other members of society.

[28] As McHugh J pointed out in Applicant A, the question whether the different treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is 'appropriate and adapted to achieving some legitimate object of the country [concerned]'. Moreover, it is '[o]nly in exceptional cases … that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means of achieving [some] legitimate government object and not amount to persecution.

[29] Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity. Ordinarily, denial of access to food shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involves such a significant departure from the standards of the civilized world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective."

27 Finally we turn to the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1. In that case the majority disposed of the matter upon the basis that the applicant had fled his country for fear of the consequences of disorder and internecine warfare rather than for fear of persecution for a Convention reason. However, Gaudron and McHugh JJ (who were in the minority) also addressed the meaning of "persecution". Their Honours' views do not seem to have been inconsistent with the views of the majority and appear to be consistent with earlier decisions. Gaudron J said ([14] – [18]):

"[14] … The difficulty in applying the Convention definition of 'refugee' in circumstances such as those in Somalia lies in recognising what, in those circumstances, is involved in the notion of 'persecution'.

[15] It should at once be noted that a person who claims to be a refugee as defined in Art 1A(2) of the Convention, has only to establish a 'well-founded fear of being persecuted'. That is usually established by evidence of conduct amounting to persecution of the individual concerned or by evidence of discriminatory conduct, amounting to persecution, of others belonging to the same racial, religious, national or social group or having the same political opinion. And to establish that the conduct in question is 'for reasons of' race, religion, nationality, etc, the individual concerned may seek to establish that that conduct is systematic, in the sense that there is a pattern of discriminatory conduct towards, for example, persons who belong to a particular religious group.

[16] The Convention does not require that the individual who claims to be a refugee should have been the victim of persecution. The Convention test is simply whether the individual concerned has a 'well-founded fear of persecution'. Nor does the Convention require that the individual establish a systematic course of conduct directed against a particular group of persons of which he or she is a member. On the contrary, a well-founded fear of persecution may be based on isolated incidents which are intended to, or are likely to, cause fear on the part of persons of a particular race, religion, nationality, social group or political opinion.

[17] A second matter should be noted with respect to the Convention definition of 'refugee', namely, that as a matter of ordinary usage, the notion of 'persecution' is not confined to conduct authorised by the State or, even, conduct condoned by the State, although, as already pointed out, the Convention has, until recently, usually fallen for application in relation to conduct of that kind. Nor, as a matter of ordinary usage, does 'persecution' necessarily involve conduct by members of a particular group against a less powerful group.

[18] As a matter or ordinary usage, the notion of 'persecution' includes sustained discriminatory conduct or a pattern of discriminatory conduct against individuals or a group of individuals who, as a matter of fact, are unable to protect themselves by resort to law or by other means. That being so, conduct of that kind, if it is engaged in for a Convention reason, is, in my view, persecution for the purposes of the Convention … ."

28 At [24], her Honour continued:

"In a number of cases, the Court has emphasized that, for the purposes of the Convention, '[persecution] … for reasons of race, nationality, membership of a particular social group or political opinion' is conduct which is discriminatory on one of those grounds and which is sufficiently serious to constitute persecution."

29 McHugh J said (at [55] – [65]):

"[55] Persecution involves discrimination that results in harm to an individual, but not all discrimination amounts to persecution. With the express or tacit approval of the government, for example, some employers may refuse to employ persons on grounds of race, religion or nationality. But discriminatory though such conduct may be, it may not amount to persecution. Other employment may be readily available. The Convention protects persons from persecution, not discrimination. Nor does the infliction of harm for a Convention reason always involve persecution. Much will depend on the form and extent of the harm. Torture, beatings or unjustifiable imprisonment, if carried out for a Convention reason, will invariably constitute persecution for the purpose of the Convention. But the infliction of many forms of economic harm and the interference with many civil rights may not reach the standard of persecution. Similarly, while persecution always involves the notion of selective harassment or pursuit, selective harassment or pursuit may not be so intensive, repetitive or prolonged that it can be described as persecution."

30 In [56] – [59], his Honour referred to numerous extracts from the cases to which we have referred above and at [60] continued:

"[60] All these statements are descriptive rather than definitive of what constitutes persecution for the purpose of the Convention. In particular, they do not attempt to define when the infliction or

threat of harm passes beyond harassment, discrimination or tortious or unlawful conduct and becomes persecution for Convention purposes. A passage in my judgment in (Chan) suggests that a person is persecuted within the meaning of the Convention whenever the harm or threat of harm 'can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class'. Read literally, this statement goes too far. It would cover many forms of selective harassment or discrimination that fall short of persecution for the purpose of the Convention. Moreover, it does not go far enough, if it were to be read as implying that there can be no persecution unless systematic conduct is established.

[61] Given the objects of the Convention, the harm or threat of harm will ordinarily be persecution only when it is done for a Convention reason and when it is so oppressive or recurrent that a person cannot be expected to tolerate it. …

[62] Dr Hathaway in his book The Law of Refugee Status thought that the Canadian Immigration Appeal Board had 'succinctly stated the core of the test' of persecution when it said that '[t]he criteri[on] to establish persecution is harassment, harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from government by oppression'.

[63] …

[64] The emphasis on the tolerability of the applicant's situation gives effect to the principal rationale for the Convention. It was persecution on grounds such as race, religion, nationality and political opinion that led to the involuntary migration of large numbers of persons before and after the Second World War and which brought about the Convention. The Convention should be interpreted against that background. Given that background, the parties to the Convention should be understood as agreeing to give refuge to a person when, but only when, he or she 'is outside the country of his [or her] nationality and is unable or, owing to such [well-founded] fear, is unwilling to avail himself [or herself] of the protection of that country'.

[65] Framing an exhaustive definition of persecution for the purpose of the Convention is probably impossible. Ordinarily, however, given the rationale of the Convention, persecution for that purpose is:

- unjustifiable and discriminatory conduct directed at an individual or group for a Convention reason
- which constitutes an interference with the basic human rights or dignity of that person or the persons in the group
- which the country of nationality authorize or does not stop, and

- which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned."

The decision of Hely J

31 At [29] – [30] Hely J observed that the Tribunal had found that the level of discrimination experienced by the applicant would have a "minimal impact" and continued:

"[29] … A 'minimal impact' may be something which is more than a trivial or insignificant matter, but is nonetheless an impact which the applicant can reasonably be expected to bear.

[30] In substance, (the Tribunal) has concluded that although the applicant has been and is likely to be the victim of officially tolerated discrimination which (the Tribunal) regards as abhorrent, the 'minimal impact' which that will have on the applicant is such that he can reasonably be expected to bear it, rather than to seek international protection. A reasonable construction of (the Tribunal's) reason is that the unjustifiable and discriminatory treatment to which the applicant was exposed, and to which he would be likely to be exposed on return to Iran, whilst an interference with his basic human rights or dignity was not sufficiently serious to warrant characterization as persecution."

32 In *Ibrahim*, McHugh J observed (at [65]) that one of the qualities of persecution for a Convention reason was conduct "which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned." Hely J considered that the Tribunal's findings in the present case meant that this requirement was not met. However he considered that the decision of this Court in *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 855, was authority for the proposition that:

"… unjustifiable and discriminatory conduct, officially tolerated, directed at an applicant by virtue of his race is persecution, unless the impact of that conduct on the applicant is trivial or insignificant." (See [36].)

33 Hely J considered that *Gersten* was inconsistent with the views express byMcHugh J in *Ibrahim* and felt obliged to follow the decision of the Full Court.

The decision in *Gersten*

34 If *Gersten* is authority for the proposition suggested by Hely J, then we find no support for it in the High Court decisions to which we have referred. Further, such a proposition appears to be inconsistent with numerous observations made in those decisions. We refer particularly to the following:

- The reference by Mason CJ in *Chan* to "some serious punishment or penalty or some significant detriment or disadvantage;

- The recognition by Dawson J in *Chan* that there is general agreement that a threat to life or freedom will amount to persecution but disagreement as to other (presumably less serious) consequences;

- The statement by Brennan CJ in *Applicant A* that: "When a person has a well-founded fear of persecution, the enjoyment by that person of his or her fundamental rights and freedoms is denied.";

- The references in *Chen* to conduct which "offends the standards of civil societies which seek to meet the calls of common humanity" and to "a significant departure from the standards of the civilized world".

35 In our view, the High Court has carefully avoided any precise definition of the term "persecution". Indeed, the cases suggest that such an approach would be undesirable. Four main reasons for this view emerge from the decisions. They are:

- The interaction of the various aspects of the definition of "refugee";

- The wide range of discriminatory conduct which may be motivated by one or other of the identified Convention reasons for persecution;

- The possibility that apparent discrimination may be justified in some circumstances by legitimate community needs; and

- The possibility that a fear of persecution may, in some cases, be based upon one, or a very small number of serious acts of discrimination experienced in the past and feared for the future, whilst in other cases the conduct experienced or feared may involve sustained repetition of conduct which might be tolerable if experienced only once or very rarely.

36 It is important to distinguish between past acts of discrimination and acts which it is feared will occur in the future. The Convention definition requires that the relevant person be outside of his or her country of nationality "owing to well-founded fear …". He or she must also be unwilling to avail himself or herself of the protection of that country "owing to such fear". The latter "fear" is of future acts. It is well-established that past events may offer a reasonable guide to what may be expected in the future. For that reason, decision-makers in this area tend to focus upon past events, making a tacit assumption that they may well be repeated in the future. However that will not

always be the case. Decision-makers must consider whether or not there are circumstances which would lead to past events being unreliable as guides to the future. Ultimately, it is the relevant person's fears for the future which must be considered in the light of the available information, including the past experiences of that person and other relevant material. The "seriousness" of past discriminatory conduct will obviously be a relevant consideration in determining whether or not he or she holds the requisite subjective fear, a fear which leads him or her to wish to avoid returning to the country in question. Such conduct will also be relevant in determining whether or not such fear is "well-founded". McHugh J was referring to this exercise in *Ibrahim* when he referred in [64] to the "tolerability of the applicant's situation". Mason CJ appears to have had the same considerations in mind in the passage from *Chan* cited above.

37 In *Gersten* the Full Court approved the earlier decision of Branson J in *Kanagasabai v Minister for Immigration and Multicultural Affairs* [1999] FCA 205. Such approval appears to have been partially responsible for the view which Hely J formed as to the meaning of *Gersten*. The relevant passage in *Kanagasabai* concerned the extract from the judgment of Mason CJ in *Chan* which appears above. Her Honour quoted part of that extract as follows:

" [the] Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns."

38 Her Honour then observed:

"… there is in my view a real difference between the concepts of 'serious punishment or penalty' and 'significant detriment or disadvantage' to which Mason CJ referred and 'serious or significant harm' in the sense in which that phrase was used by the Tribunal. Nothing in the reasons for decision of the High Court in Guo's case suggests that the High Court intended in that case to reconsider established authority on the meaning of 'persecution'. It rather intended, as I read the case to make explicit what had in earlier authority been implicit, namely, that the type of harm which can constitute persecution cannot be trivial or insignificant harm but rather must be harm of significance."

39 At first blush, it is difficult to understand the significance of her Honour's distinction between the concepts of "serious punishment or penalty", and "significant detriment or disadvantage" on the one hand and "serious or significant harm" on the other. One might well have thought that the expression "serious or significant harm" reasonably described the concepts to which Mason CJ had referred. However it is to be noted that her Honour referred to the expression "serious or significant harm in the sense in which that phrase was used by the Tribunal". This suggests that the expression had been used by it in some special way. A careful perusal of her Honour's decision indicates that this was the case. In *Kanagasabai*, the Tribunal had refused a Tamil woman's application for a protection visa. It had accepted that she believed that she was at risk of harm from the Sri Lankan police as a suspected supporter of LTTE (the Tamil insurgent movement). She had

previously received threats, and the authorities had taken possession of her house. On a number of occasions she had been apprehended and taken to a police station. She was compelled to pay money for her release. Her Honour observed (at [12]):

"The Tribunal was not satisfied that the arrests and extortions to which the applicant had been subjected have caused her such serious or significant harm as to amount to persecution."

40 At [15] – [16] her Honour continued:

"[15] Although the Tribunal made no express finding that the applicant fears persecution by reason of her race or political opinion imputed to her if she returns to Sri Lanka, it seems to me that…the Tribunal is to be understood as having found that the applicant satisfies the subjective element of the definition of refugee in the Refugees Convention.

[16] It also appears that the Tribunal accepted the applicants' evidence that she was harassed by the security forces in Colombo, taken to the police station and suffered extortion before being released."

41 At [21] her Honour set out the Tribunal's findings that it was not satisfied:

"that the arrests and extortions to which the Applicant has been subject have caused her such serious or significant harm as to amount to persecution. The harm suffered by the Applicant has caused her to be frightened, inconvenienced and intimidated, but the Tribunal does not consider that the harm suffered would amount to persecution."

42 This passage is the key to her Honour's concerns. The Tribunal appears to have distinguished between the alleged persecutory acts (arrest and extortion) and the harm caused to the applicant as a result thereof. In common usage, the word "harm" may describe either the act of causing harm (often as a verb) and the injury actually caused by such an act (often as a noun). In the above passage, the Tribunal used the word in the latter sense, however the cases suggest that the Convention definition focuses upon the conduct which causes harm and the motives for such conduct. The Tribunal thus created a misleading distinction between the relevant conduct and the damage suffered by the victim. This error led the Tribunal to substitute for the test of well-founded fear of persecution, that of fear of significant harm. Such an approach inevitably confuses the subjective and objective elements of the definition of "refugee". Branson J was concerned to correct this departure from principle.

43 In *Gersten* the Full Court was concerned with a situation which was, in some respects, similar to that in *Kanagasabai*. It is necessary to say a little

about the facts of the case. *Gersten* was a citizen of the United States of America who had practised law at the Florida Bar and had also been in politics for many years. He arrived in Australia in September 1993 and applied for a protection visa in October of that year, claiming that he would suffer persecution for reasons associated with his political opinions, should he return to the United States. This was said to be as a result of his opposition to the corruption of the "old guard" who were his political enemies, including an influential Miami newspaper and Ms Janet Reno who was then the Attorney General of the United States and had previously been state attorney for Dade County in Florida.

44 Gersten claimed that in April 1992 he had announced his candidacy for election as mayor of Dade County. A few days later, his car was stolen. He claimed that it had contained sensitive documents concerning corruption which he was investigating. Some time later, police claimed to have located the car in the possession of two people, both of whom were convicted felons, one a prostitute. They claimed that Gersten had solicited the prostitute to engage in sexual acts and that he had purchased and used crack cocaine whilst at a "crack house". It was said that the car had been stolen whilst he was at these premises. The story was leaked to the local newspaper. Broadly speaking, Gersten asserted that the investigation of these allegations was instigated by his political opponents, and that such investigation was designed to ensnare him in charges of perjury. At some stage he was imprisoned for failing to answer questions which he was legally obliged to answer. The Tribunal rejected his claim for refugee status, concluding that his concerns would be sorted out in the course of the judicial process in the United States. It rejected his assertion that he had been imprisoned for reasons of political opinion, saying that such imprisonment was a result of his refusing to answer questions which he was legally obliged to answer.

45 Gersten applied for review of the decision of the Tribunal, but this was unsuccessful. He appealed to the Full Court. Much of the judgment in the Full Court concerned the so called "but for" test of causation. This issue appears to have arisen in connection with the question of whether or not his imprisonment and other experiences were attributable to Convention persecution or to the way in which he responded to attempts by the authorities to investigate various allegations made against him. That issue is not relevant for present purposes. Gersten also submitted that the Tribunal had erred in its interpretation and application of the word "persecution" by construing the term as necessarily involving "serious harm" to the relevant person.

46 The Full Court observed (at [43] – [45]):

"[43] As has already been noted, Mr Gersten claimed that as well as imprisonment the persecution he feared included, by way of example, the cost and inconvenience of defending a perjury charge, suffering political embarrassment, interference with his business relationships and disbarment. It is submitted that, in holding that these matters were not persecution but rather harm which fell short of persecution, the

Tribunal erred in its interpretation and application of the word 'persecution', a word which it is submitted was not to be confined, as it is said the Tribunal did, to 'serious harm'. … "

[44] At the commencement of its reasons the Tribunal, in discussing the meaning of the word "persecution", indicated that it meant "serious or significant harm". It is said that it carried through in its reasons, erroneously, the concept of persecution constituting serious or significant harm as illustrated in the following extracts from its reasons dealing with the claimed acts of persecution:

> 'The Tribunal acknowledges that such a charge would, in itself, be costly and inconvenient to the Appellant. The Tribunal is not satisfied that the cost and inconvenience of defending a perjury charge would cause the Appellant such serious harm as to amount to persecution. …
>
> The Tribunal finds that even if there is a pattern of behaviour calculated to harm the Appellant, it is pattern in which the harm caused stops short of persecution if there is a pattern, it is a pattern of investigation, bad publicity, inconvenience and expense, but not persecution. His fundamental human rights have not been interfered with…
>
> The Tribunal is not satisfied that the Appellant has suffered persecution in the past. He has been put to inconvenience and expense and his good name has been damaged. The Tribunal notes that the Appellant is not prevented from expressing his political opinions. ... He may have suffered detriment or disadvantage compared to his previous political position, for instance he is no longer an elected political [sic], but even allowing for the inconvenience, expense, and publicity, he is not seriously disadvantaged compared to his fellow countrymen.' (emphasis added)

[45] It may be accepted that the word "persecution", in the context of the Convention, carries with it the connotation of harm. As the dictionary meanings discussed by Kirby J in Chen at 567-8 show, the word is capable of having a meaning such as "to pursue with harassing or oppressive treatment" (the Macquarie Dictionary) or "to subject (a person etc) to hostility or ill-treatment, especially on the grounds of political or religious belief" (the Australian Concise Oxford Dictionary). The High Court decision in Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 contains a discussion of the word (see at 399-400 per Dawson J, at 416 per Gaudron J and at 429-30 per McHugh J) which is a convenient starting point. It is clear that, while the word means infliction of harm, not every kind of harm constitutes persecution. That having been said, harm

short of interference with life or liberty may suffice. Many forms of social, political and economic discrimination may constitute persecution, including denial of access to employment and restriction on freedom of worship. Denial of access to education, food or health care constituted persecution in Chen. However that harm which is merely trivial or insignificant could not constitute persecution in the Convention sense. What is important is that there is a well-founded fear that if returned to the country of nationality (and we restrict our comments to this, the normal case) the applicant will suffer that harm. Events in the past may, in a particular case, provide a reliable guide to what might be expected to happen in the future, in the event that the applicant were repatriated.

47 Their Honours then set out the extract from her Honour's judgment in *Kanagasabai* which appears above and continued at [48]:

"It is inappropriate to attempt a definition of 'persecution', if only because whether a particular act or threat will constitute persecution will depend on the circumstances of each case. … To the extent that the Tribunal did equate persecution with significant harm and applied that as a rigid test, the Tribunal would have erred. However we do not think that it did. In our view the Tribunal did no more than reiterate … the proposition that persecution involves harm that is more than trivial or insignificant. The Tribunal concluded that the conduct complained of by Mr Gersten fell short of persecution in all the circumstances of the case, a conclusion with which we agree."

48 There were obvious parallels between the passages disclosing the error identified by Branson J in *Kanagasabai* and the passage cited above from the reasons of the Tribunal in *Gersten*. Both appeared to distinguish between persecutory conduct and the harm caused thereby. The Full Court appears to have accepted the correctness of the view expressed by Branson J in *Kanagasabai* but found that in the case under consideration, the Tribunal had not committed the same error. We consider that the words in [48] of *Gersten*, "equate persecution with significant harm" referred to the error identified by Branson J in *Kanagasabai*. Both decisions appear merely to accept that an applicant must fear that the anticipated persecution will cause harm to him or her, and that such harm must not be merely "trivial or insignificant". In the present case, there is no reason to believe that the Tribunal erred in the way in which it did in *Kanagasabai*. It follows that the decision in *Gersten*, when properly understood, is not relevant to the present case.

Criticisms of the Tribunal's reasons

49 Clearly, had Hely J shared our view as to the meaning of *Gersten*, he would not have set aside the Tribunal's decision. However the matter has proceeded before us upon the basis that regardless of the correctness or otherwise of the decision in *Gersten*, the Tribunal erred in law. The

respondent's outline of submissions suggests that the following issues fall for determination in this case, namely:

- *"Whether there is any appealable error in the finding that the conduct complained of by the Respondent, and found by the (Tribunal), is capable of being regarded as giving rise to a 'well founded fear of persecution' within the meaning of the Convention."* and

- *"Whether unjustifiable and discriminatory conduct, officially tolerated and directed at a person by reason of his race, is capable of giving rise to a 'well founded fear of persecution' within the meaning of the Convention."*

50 Neither of these propositions really addresses the true issue in the case. They suggest that the Tribunal held, as a matter of law, that the "conduct complained of" or "unjustifiable and discriminatory conduct, officially tolerated and directed at a person by reason of his race" could not, in the relevant circumstances, constitute a well-founded fear of persecution. The Tribunal did no such thing. It simply decided that a well-founded fear of persecution had not been demonstrated. However, in the course of argument, it emerged that the respondent's criticism of the Tribunal's decision was that it had applied too demanding a test (from his point of view) in determining whether or not he had a well-founded fear of persecution for a Convention reason. The criticism focussed upon the incidents of racial discrimination which the respondent had suffered whilst in Iran and whether or not they constituted a basis for his claimed fear of persecution should he return to that country. At its highest, the respondent's argument was that the Tribunal had applied a rigid and unduly onerous test in determining whether or not anticipated discriminatory conduct might amount to persecution. In its reasons the Tribunal referred to numerous authorities, including most of those referred to above. At AB 85 the Tribunal observed:

"Not every threat of harm or interference with a person's rights for a Convention reason constitutes 'being persecuted'. In Chan's case Mason CJ referred to persecution as requiring 'some serious punishment or penalty or some significant detriment or disadvantage'. In the same case, McHugh J said that the notion of persecution involved selective harassment, and that in appropriate cases it may include single acts of oppression, serious violations of human rights and measures 'in disregard' of human dignity. In Applicant A's case, his Honour stated that whether or not conducted constitutes persecution does not depend on the nature of the conduct but on whether it discriminates against a person for one of the Convention reasons."

51 Obviously enough, there can be no criticism of the Tribunal's adoption of these observations which are of the highest authority. The respondent's major criticism is of the following passage which appears at AB 91-92:

"In any event I accept that the applicant has faced some discrimination in Iran because of his colour. I make this finding on the basis of his evidence. I can find no reference in country information that indicates racial discrimination on grounds of colour alone is a major problem in Iran. I accept that he has encountered some difficulty but I do not accept that the difficulty he faced amount to persecution. Nor

have I any reason to believe that he will encounter difficulty amounting to persecution upon his return to Iran. …

The central issue in the applicant's case is whether the discrimination he faced amounts to persecution in the sense of the Convention. The applicant claims that he has a well-founded fear of persecution because he will suffer day to day from serious discriminatory acts should he return to Iran. It is important to bear in mind that discrimination per se is not enough to establish a case for refugee status. The distinction must be drawn between a breach of human rights and persecution. Not every breach of a claimant's human rights constitutes persecution: …

Various threats to human rights, in their cumulative effect, can deny human dignity in fundamental ways and should properly be recognised as persecution for the purposes of the Convention. …

Acts of regular but petty discrimination are undesirable and annoying but do not necessarily amount to the denial of human dignity in the sense of the Refugee Convention. The standard of a sustained or systemic denial of core human rights is simply not met by the allegations made by the applicant of discrimination. I am not satisfied that overall, the level of discrimination experienced by black persons, assessed cumulatively, reaches the persecution standard, namely 'some serious punishment or penalty or some significant detriment or disadvantage', selective harassment or serious violations of human rights and measures 'in disregard' of human dignity. The discrimination, although abhorrent, does not rise to the level of persecution. Low level discrimination experienced by the applicant will have a minimal impact. Low level racism may well continue to exist, however, this falls short of what is required to constitute 'persecution' for the purposes of the Convention."

> 52 Firstly, the respondent criticizes the Tribunal's use of the expression "the standard of a sustained or systemic denial of core human rights". It is difficult to attribute any real meaning to that expression, taken in isolation, unless one is able to identify the rights encompassed within the expression "core human rights". However, in the preceding sentence, it is observed that some acts of "regular but petty discrimination" may not necessarily "amount to a denial of human dignity in the sense of the Refugee Convention". This suggests that the Tribunal considered that denial of human dignity might constitute persecution and that discrimination might amount to such denial. The Tribunal also referred to the words of Mason CJ, "some serious punishment or penalty or some significant detriment or disadvantage", from the passage which was approved by a majority of the High Court in *Gua*, and is set out above. The Tribunal also referred to selective harassment, serious violations of human rights and measures in disregard of human dignity as reflecting the shades of meaning attributable to the word "persecution".
>
> 53 The Tribunal was not, in our view, seeking to create its own succinct test for determining whether or not particular conduct amounted to persecution. It was rather adopting the various descriptions used from time to time in the authorities and so informing itself as to the nature of the concept of persecution. It follows that the Tribunal's decision was informed by its consideration of these descriptions. Having so directed itself as to the law, the

Tribunal recorded its conclusion that any fear of persecution on the respondent's part was not well-founded. When one looks at the facts of the case it is not difficult to see why the Tribunal came to that conclusion. Although the respondent complained of difficulty in obtaining some forms of employment, it seems that he generally enjoyed regular employment while in Iran. His difficulties were relevant matters for consideration by the Tribunal, but they were not conclusive. Had he not been able to find employment at all, or if the differences between the conditions of the employment open to him and of that not open to him were significant, those matters would also have been relevant, but they seem not to have been in issue.

54 Evidence of other discrimination was scanty. It is unlikely that he still wishes to compete at the highest level in wrestling. In any event, he was able to achieve success in that area. The two specific instances of harassment are relatively trivial, particularly when one keeps in mind that the incident at the sporting club appears to have been, at least in part, provoked by the respondent's reply to the officials. We do not mean to suggest that the violence towards him was justified, but racial discrimination, by itself, may not have led to the violence which occurred. This was the Tribunal's view. Evidence of these two incidents, even when taken with the other evidence in the case, does not compel the conclusion that the respondent will be subjected to persecution should he return to Iran.

55 It was further submitted that:

"Where, as in the present case, it has been established that because of his racial background, the respondent has, in the past, been subject to repeated, even though at irregular frequency, acts of discrimination, humiliation and violence, coupled with a practical exclusion of any opportunity for employment in government service (notwithstanding an apparent legal eligibility for such employment) the application of the proper test should only result in a conclusion that there is serious systemic discrimination based on racial grounds. This significantly degrades the respondent's safety, occupational prospects and freedoms and, according to the accepted evidence about the irregular and arbitrary use of force by government forces or unrestrained but sympathetic gangs, raises the real prospect of repeated episodes occurring in the future with an ever present possibility of severe harm and even death."

56 This is little more than a very general summary of the facts, mixed with the inferences which the respondent says should be drawn from them, rounded off with an assertion that the combination amounts to persecution. If this summary accurately reflected the evidence, it might well have justified an inference that there was a well-founded fear of persecution. However the fact remains that in the present case, the Tribunal was not willing to draw that inference, having regard to the facts which it found to be made out. That conclusion was, in our view, reasonably open on the facts. The above submission is nothing more than an attempt to agitate the merits of the case.

57 In [20] it was asserted that:

"Despite the appellant's submissions, and some authority for the proposition, it should not be accepted that for the purposes of the Convention there is a difference between 'discrimination' and 'persecution'."

58 Unfortunately for the respondent, the High Court has held that there is such a distinction. As much is implicit in the use by Mason CJ of the adjectives "serious" (to qualify "punishment or penalty") and "significant" (to qualify "detriment or disadvantage"). Similarly, in *Chen* at [25] and [29], the High Court makes it clear that discrimination is not necessarily persecution. See also the reasons of Gaudron and McHugh JJ in *Ibrahim*.

Orders

59 We can see no error in the Tribunal's reasons. In those circumstances we order that:

- The appeal be allowed;
- The orders below be set aside;
- The application for review of the Tribunal's decision be dismissed; and
- The respondent to the appeal pay the appellant's costs of the appeal and of the proceedings before Hely J.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Marshall and Dowsett.

Associate:

Dated: 28 March 2002

Counsel for the Appellant:	Mr M Ritter
Solicitor for the Appellant:	Australian Government Solicitor
Counsel for the Respondent:	Mr E Heenan QC
Date of Hearing:	6 March 2002
Date of Judgment:	28 March 2002